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In The

Supreme Court of the United States

October Term, 1994

DAVID DUKE, *et al.*,

Petitioners,

vs.

JIM SMITH, Secretary of the State of Florida, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I.

THE RESPONDENTS' "NO BENEFIT" THEORY HAS NO MERIT.

The Florida Presidential Preference Primary statute "is the exclusive vehicle through which a person may gain access to the Florida presidential preference primary ballot" (Pet. App. C-10a). It was a two-stage process. The first stage required a decision by the political parties represented on the Presidential Candidate Selection Committee regarding who would appear on the ballot. § 103.101(2)(a). The second stage was the statutory reconsideration process accorded an excluded candidate:

> If a presidential candidate makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to reconsider placing the candidate's name on the ballot.

Section 103.101(2)(c). The court below concluded this section constituted state action, that it lacked "any articulable standards," permitted and encouraged "arbitrary and discriminatory enforcement of the law," and that David Duke "was passed over due to his speech and association" in violation of the First Amendment. (Pet. App. C-22a). The district court's decision was "REVERSED and the matter . . . REMANDED for further proceedings." *Id.* (emphasis in original).

The thrust of the Brief in Opposition is that since Duke and the other excluded candidates only won their reconsideration

argument they won nothing, because the initial stage party rejection still stood, and the Respondents have no obligation to do anything.[1]

If accepted, that cynical view means arbitrary, discriminatory, anti-First Amendment state action within the state's electoral process need not be corrected. It would mean the state can do nothing, despite its patently invalid statutory process. It also would mean that the federal court cannot provide a remedy because, according to the Respondents, the candidates were already declared *persona non grata*. It also would mean that the Court of Appeals decision was meaningless.

None of those results can be reconciled with the Florida statute, the Constitution, or federal court jurisdiction. Since § 103.101 guarantees a two-stage process, the unconstitutional second stage must be deleted or amended. Since the Constitution condemns arbitrary, discriminatory, anti-First Amendment state action, those injured by such conduct are entitled to a federal court remedy. Since the injury was capable of repetition yet evading review, the controversy continued to be cognizable under article

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1. Here is the key paragraph of the Brief in Opposition summing up the Respondents' theory:

> Because petitioners are in no different posture now than they were when they were initially denied ballot placement, and respondents are in no different posture now with respect to ballot placement than they were at the beginning of the litigation, petitioners are not prevailing parties because they received no direct benefit from the Eleventh Circuit's decision, and respondents are under no obligation to modify their behavior as a result of the appellate court's action.

Brief in Opposition, p.7.

III, § 2, United States Constitution. Since the decision below was reversed and remanded for further proceedings, the Petitioners prevailed and are entitled to fees under 42 U.S.C. § 1988.

The only basis for saying that the Petitioners did not directly benefit is the undisputed fact that the election is over. That fact places this case squarely within the framework the Petitioners have presented: since a prevailing plaintiff will never "directly benefit" when justiciability is achieved *via* the capable of repetition yet evading review doctrine, does that mean a prevailing plaintiff will always be denied attorneys fees because his or her victory comes too late?

II.

FOR PLAINTIFFS WHOSE CLAIMS SURVIVE UNDER A JUDICIALLY-CREATED EXCEPTION TO MOOTNESS, THE PURPOSE OF 42 U.S.C. § 1988 REQUIRES AN EXCEPTION TO THE "DIRECT BENEFIT" REQUIREMENT FOR AN AWARD OF ATTORNEYS FEES.

The Petition presents the important, unresolved question of whether the *Farrar v. Hobby,* 113 S. Ct. 566 (1992), "direct benefit" test applies to "capable of repetition yet evading review" plaintiffs whose direct benefits were denied because of an erroneous district court decision. (Petition, pp. 8-9, *citing Farrar v. Hobby,* 113 S. Ct. at 573). Here, the Court of Appeals reversed the district court, awarded prevailing party statutory costs, but refused Title 42 U.S.C. § 1988 statutory fees because the election which triggered the plaintiffs constitutional inquiry had passed.

The "capable of repetition yet evading review" doctrine kept the case justiciable, recognizing that important electoral constitutional rights could repeatedly be lost to unconstitutional state action if that exception to mootness were not activated. The

civil rights attorneys fee statute, Title 42 U.S.C. § 1988, encourages citizens to vindicate their constitutional rights by assuring them reasonable attorneys fees if they prevail. The decision below creates this anomaly: the protection of constitutional guarantees was important enough to preserve article III, § 2 justiciability despite the passage of the election, but the passage of the election was a sufficient reason to conclude that the Plaintiffs' victory was only pyrrhic, and thus not statutorily compensable under *Farrar v. Hobby*.

We respectfully submit that the Respondents' dismissal of "capable of repetition yet evading review" as a "non-issue strawman" (Brief in Opposition, pp. 1, 5) disregards the centrality of that concept. *But for* capable of repetition there would have been no appellate decision invalidating Florida's Presidential Preference Primary election procedures and reversing the district court. Had the district court ruled correctly, and the Court of Appeals affirmed, there would be no doubt about Plaintiffs' prevailing party status for § 1988 purposes.[2] The Respondents' construct would mean that *Farrar v. Hobby* will result in denials of § 1988 attorneys fees to all prevailing parties whose constitutional cases are decided under the aegis of capable of repetition yet evading review. Neither *Farrar v. Hobby* nor 42 U.S.C. § 1988 contemplated that rote rejection of Congress' mandate to encourage the protection of constitutional rights.

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2. A plaintiff who seeks, and obtains, a declaratory judgment of unconstitutionality has prevailed on a significant issue, *whether or not* injunctive relief is granted. *See* Petition at 9, *citing Farrar*, 113 S. Ct. at 572 (" 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit' ") (citation omitted). *See infra* at p. 5.

III.

THE DECLARATORY JUDGMENT MAKES PETITIONERS PREVAILING PARTIES FOR § 1988 FEE PURPOSES.

The Respondents' remarkable statement that "Petitioners were not unconstitutionally denied ballot access" (Brief in Opposition, p. 1) is impossible to square with the Eleventh Circuit's unequivocal holding that an integral part of the State of Florida's ballot access statute " 'cannot be squared with our constitutional standards . . . [and] is unconstitutional.' " (Pet. App. C-22a, *quoting Papachristou v. City of Jacksonville*, 405 U.S. at 171). The court below found "state action which deprived the Plaintiffs' of their First and Fourteenth Amendment rights . . . ." (Pet. App. C-23a).

Respondents posit that despite the Eleventh Circuit's unambiguous declaration that § 103.101(2)(c) is unconstitutional, ballot access *injunctive relief* would not necessarily have been available, had appellate review been completed prior to the election. We find it hard to reconcile the appellate declaratory judgment with the notion that Petitioners would not have *ipso facto* been entitled to the corresponding injunctive relief they sought, had the declaratory judgment been obtained prior to the election. It seems elementary that if the State's impediment to a candidate's ballot access ("a bipartisan committee to serve as the final gate through which all candidates must flow before securing a place on the ballot" Pet. App. C-18a) is unconstitutional, the remedy is to open the gate. However, that question was not briefed or resolved below because the issue of injunctive relief was moot during the period of appellate review.[3]

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3. The post-judgment statement by the Eleventh Circuit panel, in its Order denying fees, that "even if the primary were approaching instead of receding, our decision in *Duke v. Smith* would not benefit the appellants," is patently speculative, since the remedy issue was never before that court.

Ballot access to the Florida primary ballot was governed exclusively by § 103.101, Fla. Stat., which provided, *inter alia*, for two meetings of the Presidential Candidate Selection Committee. Respondents view this as "two ballot access opportunities." (Brief in Opposition, p. 2). Ballot access was *not* available through two independent routes. There was but *one* cohesive two-stage ballot access statute, with which Petitioners fully complied.[4] (Pet. App. C-11a, 12a n. 4).

Since the § 103.101(2)*(c)* procedure for the second Committee meeting has been declared unconstitutional (Pet. App. C-22a), the fact that the § 103.101(2)*(a)* procedure for the first meeting may not be unconstitutional does not "save" the State's statutory scheme. There must be some change in it, because section (c) is invalid. Petitioners' entitlement to attorneys fees for prevailing in their constitutional challenge to the statute must be measured by their constitutional success. The capable of repetition yet evading review doctrine which preserved justiciability and led to the declaratory relief requested (Pet. App. C, 14a n. 7) should not shield the Respondents. If the claim was important enough to survive and the state action was egregious enough to be invalidated, § 1988's encouragement of private suits to protect civil rights should make *Farrar v. Hobby's* "direct benefit" incantation inapplicable to this case.

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4. The Eleventh Circuit referred to the first meeting of the Presidential Candidate Selection Committee as one "stage of the process," not as one of two ways to gain ballot access. (Pet. App. C-12a n. 3).

CONCLUSION

For the foregoing reasons and those contained in the Petition for Writ of Certiorari, this Court should grant review of the Order of the Eleventh Circuit Court of Appeals denying § 1988 attorneys fees in this case.

Respectfully submitted,

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